

SITUS PROBLEMS IN ENEMY PROPERTY MEASURES

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It is difficult at the present stage of developments to discuss the problems in conflict of laws that will arise from the current war. The different measures that have been taken in various countries are largely provisional in character; future regulations are not easily predictable. There are, however, available to us certain general principles and experiences of the last war.¹ Those principles converge, verbally at least, around the situs of property. It is therefore largely toward that concept that the present discussion is directed.

I. THE SIGNIFICANCE OF SITUS

Lack of Uniformity in Treatment of Enemy Property

During the present war, enemy property has been treated separately by practically every one of the countries that are at war or have broken diplomatic relations with the Axis. Measures, such as seizures, freezing, compulsory administration and grant of licenses or sale, generally have a triple purpose. The state seeks to prevent the enemy from detrimental use of the funds involved, to avail itself of these funds for the promotion of war, and to secure satisfaction of claims against the enemy state or nationals. In nature, all these measures are provisional, having in view an eventual final settlement. In the case of sales of enemy property, the question of compensation is reserved. In this country, although title to property seized by the Alien Property Custodian is fully vested in him, he has declared that no step is being

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¹ Part X of the Treaty of Versailles was devoted to economic clauses. See SEN. DOC. NO. 348, 67th Cong., 4th Sess. (1923) 3445 *et seq.* (document entitled "Treaties, Conventions, International Acts, Protocols, and Agreements between the United States of America and other Powers," being Volume III of a governmental compilation of such Acts, and hereinafter cited as "III TREATIES.")

A comprehensive literature exists on the ramifications of this tenth part of the Treaty of Versailles: SIMONSON, *PRIVATE PROPERTY AND RIGHTS IN ENEMY COUNTRIES* (1921); GIDEL ET BARRAULT, *LE TRAITÉ DE PAIX AVEC L'ALLEMAGNE ET LES INTÉRÊTS PRIVÉS* (1921); SCOBELL ARMSTRONG, *WAR AND TREATY LEGISLATION 1914-1922* (2d ed.); HERMANN ISAY, *DIE PRIVATEN RECHTE UND INTERESSEN IM FRIEDENSVERTRAG* (3d ed., 1923); SAUSER-HALL, *LES TRAITÉS DE PAIX ET LES DROITS PRIVÉS DES NEUTRES* (1924); Richard Fuchs, *Die Grundsätze des Versailler Vertrages über die Liquidation und Beschlagnahme deutschen Privatvermögens im Auslande* (1927) 6 *RECHTSVERFOLGUNG IM INTERNATIONALEN VERKEHR*, part II (ed. by Leske and Loewenfeld); De Solere, *Conditions des Biens Ennemis*, 4 *RÉPERTOIRE DE DROIT INTERNATIONALE* (De Lapradelle et Niboyet, 1929).

undertaken that may interfere with the ultimate disposition pursuant to the policy to be determined by Congress.²

During the first World War the situation was analogous. The final regulation in the peace treaties with the Central Powers maintained the principle (with a few qualifications) that every Allied or associated country should be entitled separately to liquidate enemy property in its territory, although this particular phase of the regulation was not emphasized in the fundamental text of Article 297(b) of the Treaty of Versailles. This article was to the effect that "the Allied and Associated Powers reserve the right to retain and liquidate all property, rights and interests belonging at the date of the coming into force of the present Treaty to German nationals, or companies controlled by them, within their territories, colonies, possessions and protectorates, including territories ceded to them by the present Treaty."³

Territory acquired by an Allied state subsequent to the effective date of the Versailles Treaty (January 10, 1920) under another of the "Paris suburb treaties" was not included, nor did the right of liquidation extend to property situated in the vanquished countries.⁴ The provisional war measures, including those taken by the Central Powers, were ratified (art. 297) but the defeated countries had to compensate the nationals of the victorious states as well as their own nationals, who, by the force of circumstances, received but a minimal indemnification.

What system will prevail after the present conflagration is unknown, but some of the discussions published thus far seem to indicate that whatever burdens will be imposed on German private property in Germany, it will not be subject to technical liquidation as enemy property. The same territorial distinction that was made after the last war seems to be primordial. Indeed, the outline of this distinction is already being shaped by the evident difference of policies under which German foreign investments and the population of occupied portions of Germany are being treated.

It is entirely unknown, however, to what extent the United States will retain the property seized. Looking back to the eventful history of Congressional Acts and activities of the Alien Property Custodians from 1917 to 1934 and remembering searching discussions of principles and ideals involved,⁵ we may imagine many possibilities. Nor is there any visible hint whether this time each Allied country by itself will again be entitled to adopt independent provisions for the disposition of enemy property or whether some pool will be formed, as certain proposals seem to have suggested.

² Crowley, *Statement Concerning Enemy Held Patents and Trademarks* (1942) 32 TRADE MARK REP. 66, 69.

³ Correspondingly, see Art. 249 of Treaty of St. Germain, III TREATIES, *supra* note 1, at 3242; Art. 232 of Treaty of Trianon, *id.* at 3636. Also, Art. 177 of Treaty of Neuilly.

⁴ See the initial paragraph of Art. 297, Treaty of Versailles, III TREATIES, *supra* note 1, at 3462; Temperley, 5 HISTORY OF THE PEACE CONFERENCE OF PARIS (1921) 89; GIDEL ET BARRAULT, *op. cit.* *supra* note 1, at p. 55; Stamm & Cie. v. Henning (Anglo-German Mixed Arbitral Tribunal, Dec. 6, 1923) 2 RECUEIL DES DÉCISIONS DES TRIBUNAUX ARBITRAUX MIXTES 875 (hereinafter cited as "RECUEIL").

⁵ See GATHINGS, INTERNATIONAL LAW AND AMERICAN TREATMENT OF ALIEN PROPERTY (1940) with Introduction by Borchard; Borchard, *Nationalization of Enemy Patents* (1943) 37 AM. J. INT. L. 92.

Extensive Coverage of Existing Measures

There is also another reason that the present war decrees concerning enemy property do not afford a good basis for an analysis of the eventual personal or territorial limitations. Broad as were the similar economic warfare measures in the last war, they have been greatly surpassed in this. The previous Trading with the Enemy Acts and related regulations have been extended and their gaps circumspectly filled in view of the huge interests involved, the enormous increase of industrial war supply and the extreme resourcefulness and ruthlessness of the aggressors. Thus, the "freezing" orders and the use of alien patents in this country include assets of the nationals of Axis-subjugated countries; presumably these measures are to be withdrawn as soon as possible. The countries that have shifted their alliance to the United Nations present another problem. But even insofar as only the war with Germany and Japan is concerned, the concept of "enemy" or "national" of enemy countries has been defined on both sides in the broadest manner. It includes individuals of enemy nationality, domiciliaries of enemy countries, the corporations and other organizations constituted in these countries, having their principal place there, or in any way "controlled" by enemies, control being presumed in various situations.⁶ All three criteria used by competitive theories to designate the connection of a corporation with a country—incorporation, domicile (seat), and control—have been coordinated, any one sufficing to impress the character of enemy upon a corporation.

This applies to neutral individuals and organized bodies as well as to citizens of Allied countries and corporations organized in Allied countries, and naturally produces overlapping grounds of seizure by the several countries. That the various Allied alien property custodians have devised a scheme for dividing their files has not been revealed. On the contrary, not even Great Britain and the Dominions seem to have arranged an understanding. An informative book of 1943 states that conflicting claims do arise, as when Canadian shares, endorsed in blank for transfer, are physically situated in an English bank, to the order of a trustee in South Africa, under a trust with an enemy beneficiary. "All three custodians may claim the shares, and the asset will probably be reported in each of the countries."⁷

In the period following the last war, a few interallied agreements and also some arrangements with the enemy offices were reached, supplemented by the rulings of the Mixed Arbitral Tribunals. However, for delimiting the exercise of the right of liquidation, the only established basis was the territorial distinction of all property according to its location.

The Force of Territorialism

The principle of territorialism, granting a state exclusive sovereign power over a part of the earth's surface, is so firmly rooted in the forceful traditions of international

⁶ As to freezing regulations, see Note, *Foreign Funds Control Through Presidential Freezing Orders* (1941) 41 COL. L. REV. 1039, 1045; as to trading with the enemy generally, see DOMKE, *TRADING WITH THE ENEMY IN WORLD WAR II* (1943) *passim*.

⁷ F. C. HOWARD, *TRADING WITH THE ENEMY* (London, 1943) 83.

law that it will again prevail in some form as a matter of course after this war in the relations among the allied countries, between them and the enemy countries, and in the relationship towards the neutrals.

Mr. Justice Brandeis, speaking for the Supreme Court of the United States in the case of an undemanded bank deposit seized by the State of California under its statute on escheat, pointed out⁸ that under the Court's decisions, the proceedings for escheat,⁹ as well as for confiscation,¹⁰ forfeiture,¹¹ condemnation¹² and similar matters, are not "in personam" but "in rem." In a recent case of escheat, the Supreme Court explained that it does not matter so much whether the proceedings are called in rem or quasi in rem; what matters is that the obligation of a bank to pay in accordance with the terms of the deposit is a part of the mass of property subject to state control, wherefore due process of law is satisfied with fair notice and opportunity to the possible owner to be heard.¹³

The recent comprehensive discussions in this country devoted to the extraterritorial effect of the Soviet nationalization decrees¹⁴ and of the German exchange restrictions,¹⁵ testify anew to the persistence of the principle in its several aspects.

On the one hand, it is an often repeated thesis that "the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."¹⁶ As the State Department reminded an American citizen complaining about the interference of the German "transfer" prohibitions with his investment: "Investments or funds within the jurisdiction of a foreign country are subject to the laws of that country. In the absence of specific treaty provisions to the contrary, there is no way in which a private person may secure immunity from the local law for his investments or property held within the jurisdiction of a particular state."¹⁷

Thus, the confiscatory Soviet decrees have been finally recognized in almost all countries to the extent that they affect the property situated in the Soviet territory.¹⁸

⁸ See *Security Savings Bank v. State of California*, 263 U. S. 282, 287 (1923).

⁹ *Christiansen v. King County*, 239 U. S. 356 (1915).

¹⁰ Act of Congress of July 17, 1862, §§5-7, 13 STAT. 272; *The Confiscation Cases*, 20 Wall. 92 (U. S. 1873).

¹¹ *Friedenstein v. United States*, 125 U. S. 224 (1888).

¹² *Huling v. Kaw Valley Ry.*, 130 U. S. 559 (1889).

¹³ *Anderson Nat. Bank v. Lockett*, 321 U. S. 233 (1944).

¹⁴ Borchard, *Extraterritorial Confiscations* (1942) 36 AM. J. INT. L. 275, 276 n. 9; Jessup, *The Litvinov Assignment and the Pink Case*, id. at 282, 285; Gilligan, *Extraterritorial Effect of Foreign Decrees and Seizures* (1940) 88 U. OF PA. L. REV. 983, 988; Note, *Protective Expropriatory Decrees of the Governments in Exile* (1941) 41 COL. L. REV. 1072, 1077.

¹⁵ Freutel, *Exchange Control, Freezing Orders and the Conflict of Laws* (1942) 56 HARV. L. REV. 30; DOMKE, *op. cit. supra* note 6, at 314 ff.

¹⁶ *Underhill v. Hernandez*, 168 U. S. 250 (1897); *Polydore v. Prince*, Fed. Cas. No. 11257 (D. Me. 1837).

¹⁷ 2 HACKWORTH, DIGEST OF INTERNATIONAL LAW (1941) 71; cf. *Holzer v. Deutsche Reichsbahn-Gesellschaft*, 277 N. Y. 474, 14 N. E. (2d) 798 (1938); *Branderbit v. Hamburg-America Line*, 31 N. Y. S. (2d) 588 (Sup. Ct. 2d Dept. 1941).

¹⁸ *Salimoff & Co. v. Standard Oil Co. of New York*, 262 N. Y. 220, 186 N. E. 679 (1933); *Vladikovkazsky Ry. Co. v. New York Trust Co.*, 263 N. Y. 369, 189 N. E. 456 (1934). England: (on condition of recognition of the foreign government by the government of the forum) *Luther v. Sagor* [1921] 1 K. B. 456, *rev'd* after the recognition [1921] 3 K. B. 532; CHESHIRE, PRIVATE INTERNATIONAL LAW (2d ed. 1938) 151. The European courts have finally recognized that branches of nationalized Russian corporations have been dissolved.

On the other hand, American courts,¹⁹ like all others,²⁰ have consistently refused to give effect to foreign confiscations in application to property situated in the forum or even a third country. The forum's public policy, obviously is also reflected in this rule. Guided by international treaties, it may work in opposite directions in the two types of cases and is the strongest component factor in the matter of forcible seizures.

Interplay of Territorialism and Public Policy

For recognizing a belligerent's confiscatory seizures beyond its territory, a specific reason is needed. The Versailles Treaty was ratified and published as internal law by Germany and was thereby binding. Conversely, economic war implies the absence of any recognition whatever of seizures by enemies or neutrals, so long as the war lasts. Thus, the two periods pending and after the war are sharply distinguishable.

During wartime, as is the case at the present writing, the one-sided hostile seizures by a belligerent are, naturally, repudiated by the foe. Moreover, from 1914 to 1918 refusal of recognition of such acts could be based on a principle of international law that was not even questioned, at least not on the European Continent. An American federal court hardly needed to argue that American law should apply to a partnership between an American and a German partner carrying on business in the United States in order to reach the result that the common law rule annulling the contract should apply and that a German court decree inimical to the American partner should be refused recognition.²¹ Whatever the applicable law, a German hostile measure was ineffective in this country, if in fact such was the nature of the appointment of a "Pfleger" (absence trustee); if, on the other hand, it was merely conservative, for the protection of the American partner, recognition was due.²² The German Supreme Court concluded, even after the effective date of the Peace Treaty, that English and French seizures during the war, contrary to international law, could not excuse non-payment of a debt or non-restitution of property to the person

¹⁹ In recent years: *Weber v. Johnson*, 15 N. Y. S. (2d) 770 (Sup. Ct. N. Y. County, 1939); *Anninger v. Hohenberg* (1939) 172 Misc. 1046, 18 N. Y. S. (2d) 499 (1939). The hope has been expressed that the doctrine of *Pink v. United States*, 315 U. S. 203 (1942) may be confined to the scope of the Litvinov Agreement: Borchard, *supra* note 14; Jessup, *supra* note 14; Note (1942) 51 YALE L. J. 848; LAUTERPACHT, ANNUAL DIGEST AND REPORTS OF PUBLIC INTERNATIONAL LAW CASES 1938-1942 (1942) 141, 150.

²⁰ England: *The Jupiter No. 3* [1927] P. D. 122, *aff'd* [1927] P. D. 250; *Banco de Vizcaya v. Don Alfonso de Borbon y Austria* [1935] 1 K. B. 140; *The El Condado*, 63 L. L. R. 330 (Scot. Ct. of Sessions, 1939).

France: *Société Potasas Ibericas v. Bloch*, Cass.-civ., March 14, 1939, 34 REV. CRIT. DE DR. INT. PRIVÉ (1939) 280, 6 NOUV. REV. DE DR. INT. (1939) 163 and precedents cited in the notes thereto.

Germany: Reichsgericht cases reported in 60 ENTSCHEIDUNGEN DES REICHSGERICHTS IN ZIVILSACHEN (hereinafter cited as RGZ.) 300; 63 *id.* 93, 183; 106 *id.* 83; 110 *id.* 173; 119 *id.* 259, etc.

²¹ *Mayer v. Garvan*, 278 Fed. 27 (C. C. A. 1st, 1922), fundamentally criticized by Anderson, dissenting.

²² *Hennequin v. German Gov't*, Franco-German Mixed Arb. Trib., July 13, 1922, 2 RECUEIL, *supra* note 4, at 305; *L. Weil v. German Gov't*, same, Dec. 11, 1922, 2 *id.* at 771. In another case before the same tribunal the German measure was qualified as a war supervision. Decision of May 13, 1922, 2 *id.* at 116.

originally entitled thereto and that the resulting default continued to be legally significant.²³

Neutrals likewise normally withhold any recognition to exceptional war measures for the double reason that public law is inapplicable in a foreign court and that foreign measures implementing war "in the economic or any other domain" must be disregarded.²⁴ This attitude is in harmony with general principles. Penal and political, as well as confiscatory, foreign laws and decrees are traditionally refused recognition. Deprivation of property without due process of law and just compensation is considered contrary to international law, as well, generally, as to the fundamental conceptions of the forum. A more flexible approach, however, has been adopted toward such matters as annulment of gold clauses and prohibition of certain money payments, especially when a court has seen that its own legislature has been compelled or was likely to resort to measures similar to those previously held repugnant to basic institutions. Nevertheless, German courts rejected Hungarian debtors' excuse based on the ground of Hungarian transfer restrictions,²⁵ and the Swiss Federal Tribunal continued to deny to German exchange legislation any extraterritorial effect,²⁶ on the ground that these measures formed part of an economic belligerence, protecting domestic and discriminating against foreign interests. This view, which has been advocated in this country,²⁷ seems much more satisfactory than a third rationale, to the effect that the debtor is responsible for not being able to pay, since his own state has caused his inability; he should bear the risk of damage occasioned by such legislation while he enjoys the benefits procured by the national economy of which he is a part.²⁸ However this may be, evidently the facts and their relation to the forum ought to be carefully investigated before "public policy" is invoked to refuse recognition. Thus, it would follow that war measures of an allied country, aiming at the same goal, are to be sustained to the extent that they are not harmful to the forum's own war policy. This is what has resulted, though on an insecure basis, in the cases maintaining the decree of the

²³ Reichsgericht, September 22, 1930, 130 RGZ. 23, 30. See also the decision of June 13, 1934, 145 RGZ. 16 at 19.

²⁴ *Compagnie Universelle de Télégraphie et de Téléphone Sans Fil v. United Service Corp.*, 84 N. J. Eq. 664, 95 Atl. 187 (1915); Swiss Fed. Trib. decision of Dec. 17, 1914, 40 *ENTSCHEIDUNGEN DES BUNDESGERICHTS* (hereinafter cited as BGE.) I, 483 (French decree preventing a French insurance company to accept premium payment by enemy). Accord, Swiss Fed. Trib., April 17, 1916, 42 *id.* II, 179, (1917) *REV. DR. INT. PRIVÉ* 348, *Journal Clunet*, 1917, 306; Trib. Monaco, May 24, 1917, *Journal Clunet*, 1917, 1508, (1917) *REV. DR. INT. PRIVÉ* 602 (French prohibition of payment); Trib. Genève, Nov. 30, 1917, *Journal Clunet*, 1918, 765, (1918) *REV. DR. INT. PRIVÉ* 190 (German sequestration in occupied Russian Poland).

²⁵ Kammergericht, Oct. 27, 1932, (1932) *JUR. WOCH.* 3773; Landgericht Berlin I, Feb. 19, 1932, (1932) *JUR. WOCH.* 2306.

²⁶ 60 BGE. II, 294, 310; 61 *id.* 242, 246; 62 II *id.* 108. The rejection extends to the case where the debt is governed by German law, see decision of March 2, 1937, 63 *id.* II 42, *PRAXIS D. BG.* (1937) 115.

²⁷ Freutel, *supra* note 15, at 58.

²⁸ 2 RAAPE, *DEUTSCHES INTERNATIONALES PRIVATRECHT* (1939) 315, 321, approving position taken by KOEPPPEL, *DIE DEUTSCHE DEVISENGESETZGEBUNG IM INTERNATIONALEN PRIVATRECHT* (1938) (not available to the writer).

Netherlands that vested Dutch private property in the Crown,²⁹ and (in England) sanctioning requisition of vessels by the Norwegian government.³⁰

But do foreign prohibitions of disposition such as are included in the Trading with the Enemy Acts never excuse a debtor? It is noteworthy that not only the Dutch courts but also the German Reichsgericht³¹ accepted the justification of non-performance factually caused by the obstacles in the English Trading with the Enemy Act, correctly in the present writer's opinion, though contrary to the courts of many other jurisdictions.

Territorial Limitations Despite Treaty

Having accepted the peace treaty, the vanquished countries had to recognize all seizures and ensuing liquidations in the adversary countries. The territorial limits, however, remained. The victor was entitled only to take property within its territory. For instance, the authority of an alien property trustee was restricted to his territory, a phenomenon familiar to the common law. A law suit won in an English court against a German debtor nominally represented by the trustee, could not have the effect of *res judicata* against the debtor as respects the latter's property situated in Germany³²

The principle governing relations between neutral countries and the parties to any international treaty is very clearly settled. With regard to third states a treaty is *res inter alios acta*; "a treaty creates law only between the States being parties to it."³³ There are, however, exceptions to the principle, and among them is the case where a third state, according to its own conflicts rules, has to apply the law of one of the states participating in the treaty and incorporating it into its law. In this sense, in the Netherlands, Switzerland, Luxemburg,³⁴ and possibly elsewhere,

²⁹ Anderson v. N. V. Transadine Handelsmaatschappij, 289 N. Y. 9, 43 N. E. (2d) 502 (1942); see for other cases 65 N. Y. STATE BAR ASS'N REP. (1942) 275.

³⁰ Lorentzen v. Lydden & Co. [1942] 2 K. B. 202. On an analogous Swedish decision see Jessup, *supra* note 14, at 287 n. 19.

³¹ The Netherlands: Trib. Rotterdam, Oct. 5, 1916, reported in VAN HASSELT, DE NEDERLANDSCHE RECHTSPRAAK BETR. INT. PRIVATRECHT (1936) 143; also, other decisions therein cited at 141.

Germany: Reichsgericht, June 28, 1918, 93 RGZ. 182 (English company in Buenos Aires excused from non-delivery of goods).

³² Stamm & Cie v. Henning, Anglo-German Mixed Arb. Trib., 2 RECUEIL, *supra* note 4, at 875; Brixhe and Deblon v. Agrippina, German-Belg. Mixed Arb. Trib., March 31, 1922, 2 *id.* 7; Peeters, van Haute et Duyver v. Trommer et Grüber (same trib.) 2 *id.* at 384. This was not understood by the App. Brussels, July 15, 1921, 1 *id.* at 713, where the appointment of a custodian by the Court of Sessions in Edinburgh was held good for standing in court in Belgium, because "English" law governed the contract.

³³ Judgment No. 7, May 25, 1925, P. C. I. J., Ser. A No. 7, p. 29; ANZILOTTI, COURS DE DROIT INTERNATIONAL (1929) 414.

³⁴ Peace treaty provisions have been applied under this theory in the Netherlands: Deutsche Bank v. Zirini, Trib. s'Gravenhage, Feb. 7, 1922, WEEKBLAD 11010, *aff'd*, Appel s'Gravenhage, Nov. 30, 1922, WEEKBLAD 11094, *re-aff'd*, Hooze Raad, Jan. 10, 1924, WEEKBLAD 11161, WILLIAMS AND LAUTERPACHT, ANNUAL DIGEST OF PUBLIC INTERNATIONAL LAW CASES, 1919-1922 (1932) 324, case No. 235; dec. of March 13, 1928, Court of Appeal, Amsterdam, WEEKBLAD 11816, McNAIR AND LAUTERPACHT, ANNUAL DIGEST OF PUBLIC INTERNATIONAL LAW CASES, 1927-1928 (1932) 414, case No. 285. The related rule that the Peace Treaty is not applied when the law of the forum governs appears in the decision of the Swiss Federal Tribunal, *infra* n. 35. Likewise the Court of Appeals of Luxembourg, May 29, 1925, Journal Clunet, 1929, 472, 476. Cf. Chailley, in RÉPERTOIRE DE DROIT INTERNATIONAL (De Lapradelle et Niboyet) SUPP. (1934) 324, No. 168.

the tenth part of the Versailles Treaty has been given effect so as to modify private rights and obligations existing between the subjects of former enemy states.

The Swiss Federal Tribunal has declared its position in two cases, both denying the application of the Versailles Treaty despite the fact that both parties belonged to states bound thereby. "Since Switzerland is not a party to the Peace Treaty of Versailles, its provisions have no force of law in our territory."³⁵ In the first case the insurance contract on which the action was based was governed by Swiss law by virtue of a stipulation as well as the Swiss place of performance; the second concerned a problem of Swiss judicial jurisdiction, which, pertaining to Swiss public law, could not be altered by any event connected with French war seizures or administration.

A distinguished Swiss author, writing after the first of these decisions, has insisted on the bilateral character of the treaty provisions. By the consent of the vanquished nations, the war measures should have been accorded international recognition, even by the neutral states. They should not be applied in the latter, however, to the extent that they offend the public policy of the forum or seek to control property situated in the territory or legal relationships governed, under the private international law of the neutral court, by the law of the forum.³⁶ This formula, less cautious than the language of the Swiss Federal Court in acknowledging the modifications worked by the peace treaties on private law relations, may yet fairly describe the actual position of the neutrals.

It cannot be expected that those states which neither participate in the eventual treaties nor, by a formal act of recognition, join in their enforcement, will agree to any and all measures affecting property situated in their own territories. That this alone causes some substantial problems will be illustrated hereafter. In view of the many difficulties that will arise on the termination of the present cataclysm a fair understanding with the neutral powers would be highly desirable.

II. THE SITUS OF SIMPLE DEBTS

Although it is frequently asserted that debts not embodied in an instrument have no situs, the necessity of localizing them under traditional analyses is evident in many fields, such as taxation, involuntary assignment (a class including war seizures and liquidations), jurisdiction for litigation, death duties, grant of probate and administration of estates. These purposes require differentiated treatment. The criteria of localization, too, are differently selected in the various countries. Nevertheless, there exists a natural temptation in discussing one subject to look for analogies in another, particularly so in the matter of war measures which enjoy very little judicial authority, since the victorious powers have generally excluded enemy aliens from relief in the courts on account of property seizures. The most popular resort is that made to jurisdiction for garnishment. Seizures are compared with

³⁵ Bundesgericht, November 4, 1920, 46 BGE. II 421, at 423; same trib. December 11, 1925, 51 *id.* I 417, at 420.

³⁶ SAUSER-HALL, *op. cit. supra* note 1, at 41, 43.

the order prohibiting the garnishee to pay his original creditor, and liquidation is comparable to the order divesting the original creditor of his right and transferring it to the garnishor.

Analogies from Systems of Conflicts Rules in Garnishment

The procedural rules regulating garnishment are too diverse to be discussed here. With respect to the jurisdiction for the final expropriating decree, three systems may be distinguished.

(a) In France,³⁷ Germany³⁸ and most other Continental countries, garnishment (*saisie-arrêt*, *Forderungspfändung*) has to be sought at the domicile of the debtor's debtor. The French Court of Cassation takes the exclusive nature of jurisdiction at that place so seriously that French courts have been declared without jurisdiction against a garnishee domiciled abroad, just as in a case of seizure against other property situated abroad.³⁹ Under this French private international law rule, Alsatian courts, assuming jurisdiction at the domicile of the garnishee, have applied their own local civil procedure differing from the French.⁴⁰

The German doctrine rests on the broadest imaginable generalization of Section 23 of the Code of Civil Procedure, whereby, for the purpose of jurisdiction in a personal action, a debt is situated at the debtor's domicile. If the garnishee is domiciled abroad, the German courts will grant garnishment at the domicile of the principal debtor within the forum, but the Supreme Court has confirmed the view that the garnishee must be given service of process at his own domicile and that the efficacy of the grant therefore depends on the readiness of the foreign state.⁴¹ It is well known that neighboring states refuse such cooperation.⁴²

That the domicile of the garnishee is selected is commonly justified by the double advantage that this place is ascertainable with relative ease and that, in the development of the old maxim, *actor sequitur forum rei*, a debtor may be sued at his domicile even though he is absent and there are other, non-exclusive, jurisdictions. His assets are deemed to be concentrated there. On this basis, the place where the debt is to be paid appears immaterial. Procedural steps are taken to safeguard the interests of the original debtor, but the proceedings are centered in the suit against the garnishee.

(b) The common law system may become essentially similar under very common statutes, universally held valid, permitting personal jurisdiction of the debtor through service of process at his residence even though he cannot be found there. Originally, indeed, as Beale has demonstrated, the custom of London regarded garnish-

³⁷ GLASSON, MOREL ET TISSIER, 4 TRAITÉ DE PROCÉDURE CIVILE (3d ed. 1925-36) No. 1166 bis; LEREBOURS-PIGEONNIÈRE, PRÉCIS DE DROIT INTERNATIONAL PRIVÉ (3d ed. 1937) 344, No. 299; cf. *id.* at 433, No. 357.

³⁸ Reichsgericht, Oct. 12, 1895, 36 RGZ. 355; same, May 16, 1933, 140 *id.* 340; same, June 18, 1907, 63 SEUFFERTS ARCHIV, p. 41, No. 27.

³⁹ Cass.-civ., May 12, 1931, Sirey, 1932, I 137, Dalloz Jur., 1933, I 60.

⁴⁰ GLASSON, MOREL ET TISSIER, *supra* note 37, at No. 1166; *adde* Koechlin v. Risso, App. Colmar, March 23, 1938, 19 REV. JURID. D'ALSACE ET DE LORR. 588.

⁴² (1933) 140 RGZ. at 343.

⁴² SCHNITZER, HANDBUCH DES INTERNATIONALEN PRIVATRECHTS (1937) 338.

ment proceedings as directed *in rem* against a debt due in London by a debtor domiciled at the forum.⁴³ It should be noted that modern English courts, although analyzing the situation of simple debts in terms of personal jurisdiction at the place where it is "properly recoverable," nevertheless do consider various circumstances. Thus, Lord Scrutton in a leading case pointed out that the debt arose in London and that the original debtor appeared in the law suit and submitted to the jurisdiction, obtaining a benefit thereby. He thought that any foreign country would recognize such jurisdiction.⁴⁴ As it seems, a normal residence of the garnishee is generally presupposed,⁴⁵ and a mere temporary sojourn of the garnishee would perhaps not suffice in England. But in the United States, the courts in overwhelming majority⁴⁶ have construed the proceedings as directed against a debt located for jurisdictional purposes wherever the garnishee could validly be served with process. So to speak, the debt is where the garnishee may be sued personally by his creditor. The Supreme Court of the United States, approving this view, has stated that, under the full faith and credit clause, any other state has to recognize the double effect of the proceedings divesting the original debtor and investing the garnishor.⁴⁷

The fact that in several states domicile does determine jurisdiction, and that this seems to enjoy interstate effect if fair notice is given to the debtor,⁴⁸ serves only to increase the number of jurisdictions having power to dispose of the debt. The writers have noticed the inconvenience to the original debtor in being compelled at his peril to appear in any court of the world where his alleged creditor happens to sue his alleged debtor. By the effect of their procedural institutions, the inconveniences of being cited to come to the garnishee's domicile are not so great and dangerous in the Continental system. Another danger is that the garnishee may be compelled to pay the same debt once again in a foreign country where the American garnishment does not produce *res judicata*. To obviate this, some English and American decisions have denied the garnishment order if the danger is convincingly proved.⁴⁹ Much criticism by the writers of the entire mechanism of this institution has been noteworthy.⁵⁰

(c) In certain legislative systems, it is apparently essential that not only the garnishee but in addition either the garnishor or the latter's debtor should be

⁴³ Beale, *The Exercise of Jurisdiction in Rem to Compel Payment of a Debt* (1913) 27 HARV. L. REV. 107; 1 BEALE, CONFLICTS (1935) §108.2, p. 460 ff.

⁴⁴ See *Swiss Bank Corp. v. Boehmische Industrial Bank* [1923] 1 K. B. 673, 682.

⁴⁵ See Lord Atkin, in *New York Life Ins. Co. v. Public Trustee* [1924] 2 Ch. D. 101, 119: "... domicile where the creditor could enforce the debt."

⁴⁶ For the exceptions see STUMBERG, CONFLICT OF LAW (1937) 101.

⁴⁷ *Harris v. Balk*, 198 U. S. 275 (1905); *Louisville and Nashville R. R. v. Deerp*, 200 U. S. 176 (1906); *Baltimore and Ohio R. R. v. Hostetter*, 240 U. S. 620 (1915); RESTATEMENT, CONFLICTS OF LAWS (1934) §108.

⁴⁸ See Mr. Justice Holmes in *McDonald v. Mabey*, 243 U. S. 90 (1917) and comment by STUMBERG, CONFLICT OF LAW (1937) 76.

⁴⁹ *Parker, Peebles & Knox v. National Fire Ins. Co.*, 111 Conn. 383, 150 Atl. 313 (1930); Note (1930) 40 YALE L. J. 139.

⁵⁰ Beale, in 27 HARV. L. REV. *supra* note 43, at 120; GOODRICH, CONFLICT OF LAWS (2d ed. 1938) §68; NUSSBAUM, PRINCIPLES OF PRIVATE INTERNATIONAL LAW (1943) 207.

domiciled in the forum.⁵¹ The Swiss courts consider a debt situated at the place of the creditor's domicile; if, however, this place is abroad, the debt may be attached, and as it seems, also garnished at the Swiss domicile of the debtor.⁵²

Among these systems, none of them flawless, evidently only the first, in its rigid French application, serves the convenience of international harmony. International recognition for the jurisdiction of the garnishee's domicile has been already postulated.⁵³ French authors have broadened the idea that in international relations a debt is to be localized at the domicile of the debtor since he is the person who is to furnish the subject matter of the enforcement.⁵⁴ This French doctrine is very firm⁵⁵ and probably has strongly influenced the ideas in the background of the Versailles Treaty.

Doctrine and Application Under Treaty

Under the Peace Treaties of 1919 a few voices advocated the domicile of the creditor or the place where a debt ought to be performed,⁵⁶ or a cumulation of requirements.⁵⁷ However, practical convenience in this case so evidently favored the domicile of the debtor that it was adopted in England,⁵⁸ France, Germany, Switzerland,⁵⁹ and probably elsewhere. To illustrate: late in 1918 the Brussels branch of a German bank sent a check of a German customer for collection to a Belgian bank at another place. After this bank collected the check and credited it to the Brussels branch, the Belgian government seized the credit. The German Supreme Court recognized that Belgium correctly liquidated the debt of the second bank due to the branch and concluded that the customer could not require payment of the proceeds.⁶⁰

Thus, liquidation depended on the domicile of the debtor within the country and enemy nationality of the creditor at the decisive time. A debt of a French dom-

⁵¹ This seems to be the Dutch system. See VAN HASSELT, *op. cit. supra* note 31, at 474. But in the absence of more literature available it does not seem clear whether the decision of the Hoge Raad, January 20, 1939, WEEKBLAAD 569, regarding attachment of a foreigner's assets, does not imply some broader rules concerning garnishment.

⁵² Swiss Fed. Trib., 31 BGE. I 210, 521; 32 *id.* I 814; 47 *id.* III 75; 56 *id.* III 50, 230; SCHNITZER, *op. cit. supra* note 42, at 338.

⁵³ See Rheinsteint in (1934) 8 ZEITSCHRIFT FÜR AUSLANDISCHES UND INTERNATIONALES PRIVATRECHT 277.

⁵⁴ ANDRÉ WEISS, 4 TRAITÉ DE DROIT INTERNATIONAL PRIVÉ (1912) 430-3; SAUSER-HALL, *op. cit. supra* note 1, at 80 n. 1, citing ALEX. WAHL, LE RÉGIME FISCAL DES SOCIÉTÉS ET DES VALEURS ÉTRANGÈRES.

⁵⁵ I remember that André Weiss orally professed this doctrine as perfectly settled.

⁵⁶ See citations in Fuchs, *supra* note 1, at 117.

⁵⁷ According to RAAPE, *op. cit. supra* note 28, at 284, either the state of the creditor or that of the debtor has power to seize the debt.

⁵⁸ New York Life v. Public Trustee [1924] 2 Ch. D. 101. See also *In re Queensland Mercantile & Agency Co.* [1891] 1 Ch. 536, *aff'd* [1892] 1 Ch. 219, applying Scottish law to the question of priorities between two conflicting assignments of a claim, since the debtors were resident in Scotland.

⁵⁹ France: Circular letter of the French Prime Minister of December 11, 1918, on the sequestration of enemy property in Alsace-Lorraine, sub. II. Cf. the Decree of February 28, 1916, art. 2 (2) on the declaration of debts at the domicile of the debtor.

Germany: Reichsgericht, June 2, 1923, 107 RGZ. 44, 46; same trib., May 2, 1924, 108 *id.* 265, 267; same trib., March 18, 1931, 132 *id.* 128.

Switzerland: SAUSER-HALL, *op. cit. supra* note 1, at 80.

⁶⁰ Reichsgericht, April 5, 1924, (1924) 29 DEUTSCHE JURISTENZEITUNG, col. 828.

iciary due a German domiciled in England was, therefore, subject to liquidation only in France.

It was also concluded therefrom that a Swiss domiciled in France validly discharged his debt to a German creditor by payment to the French custodian office, whereas a debt of a Swiss domiciled outside of France due to a German domiciled in France was not susceptible of liquidation.⁶¹ Allied custodians, however, did not always feel bound to the latter restriction. In one case, the French sequestrator wrote a letter to a Danish bank which never had a French branch to pay to him a sum of Danish crowns representing the amount to the credit of a partnership carried on by Germans in France and now in liquidation under French war measures. The bank obliged by sending 22,000 crowns. The German Supreme Court held that the bank should not have obeyed and should pay over to the original creditors.⁶²

Disowning this entire conception, the Nationalist-Socialist confiscatory decrees sought to take over the claims of the victims against foreign debtors, a pretension rejected by American courts on the ground that a debt owed by a New York corporation to the firm affected by a confiscation was a property in New York and could not be reached by the acts, decrees or laws of the German government.⁶³

Complications Arising from Business Branches

Some applications of the principle caused difficulties and discussions familiar in the cases of garnishment were recalled, for example, when the danger of double liability arose in a claim of the custodian or of the original creditor.

Outstanding was the problem of debts arising from engagements entered into by the branch office of a foreign business organization. When a German debtor had no branch in Belgium, he certainly could not escape an action by his creditor seeking to secure satisfaction out of his German assets, although he had assets in Belgium seized by the Belgian authorities.⁶⁴ In other words, the internal instructions of the liquidating state were in conformity with the Treaty if they assigned marshalling privileges only to debts secured by local assets. The problem arose whether the same principle should apply to branches.⁶⁵

No doubt it is in the nature of a branch, as contrasted with a subsidiary corporation or agency, to form, in legal conception, an integral part of the enterprise. Ordinarily, a debt contracted by a branch in its course of business may be enforced by suing the principal establishment. But there are exceptions to this in peace

⁶¹ SAUSER-HALL, *op. cit. supra* note 1, at 80. An erroneous argument for extending the scope of liquidations was sometimes adduced from the apparently broad language of §2 of the annex to Arts. 297-298 of the Versailles Treaty. In the dominant opinion Art. 297(b) was decisive.

⁶² Reichsgericht, June 13, 1934, 145 RGZ. 16.

⁶³ See the New York cases cited *supra*, note 19; see also DOMKE, *op. cit. supra* note 6, at 335 on freezing operations in occupied and Vichy France.

⁶⁴ These seem to be the facts of *Brixhe et Deblon v. Württembergische Transport Versicherungs Gesellschaft*, Belgo-German Mixed Arb. Trib., June 8, 1925, 5 RECUEIL, *supra* note 4, at 696.

⁶⁵ This was answered in the affirmative, against a strongly motivated decision of the lower courts, by the Belgian Court of Cassation, May 6, 1926, in *Jacquain et Morelle v. Société Nef & Cie.*, Pasirisie, 1926, I 364, and a Belgian Royal Decree of September 21, 1926, MONITEUR BELGE No. 267; also by an early German decision, OLG. Hamburg, May 30, 1922, 5 HANSEATISCHE RECHTSZEITSCHRIFT 895 No. 184.

times for the sake of convenience in the administration of such businesses.⁶⁶ So the question arises, at which place should this debt be deemed "located" when the assets of the branch are forcibly broken loose from the main body. An eminent German writer has answered that any Englishman having dealt with the London branch of the Deutsche Bank, for his credit account, could sue the latter's central office in Berlin without regard to the possibility of being satisfied from the assets of the London branch in liquidation and, conversely also, that the claim of a German national acquired by deposit with the branch in London, was exclusively situated in Berlin, outside of British territory, and therefore not susceptible of English liquidation.⁶⁷ Although this is a simple solution, it hardly was intended by the Peace Treaty. Since any customer or, for this matter, any contractual creditor of the branch was entitled to sue the bank at the place of its branch in London, it could not be denied that the debt was, in the language of the English courts, "recoverable, that is situate" there. At this juncture, the English Court of Appeals rendered its only decision involving the subject in a law suit between the New York Life Insurance Company as the debtor of the amount of a life insurance policy, and the English Public Trustee.⁶⁸ The insurance was issued by the London office of the company on the life of a German national and became payable during the war. Judge Romer of the lower court declared the debt situated in New York. The Court of Appeals, however, held that as the business of the plaintiff had several "residences" something more than the simple fact of residence was required to constitute the location of the debt. It was, therefore, considered permissible and necessary to look at the terms of the contract. From them it appeared, in Lord Atkin's opinion, that in the case at bar no difficulty really existed at all "because the actual contracts are expressed to be contracts to pay a sterling sum in London."⁶⁹ "That right is situate in this country and only in this country."⁷⁰

Reliance was placed upon Dicey's conception that debts or causes in action are generally to be looked upon as situated in the country where they are properly recoverable or can be enforced.⁷¹ Correspondingly the decision has been classified by commentators as among those cases in which a bank debt was regarded as more closely tied to the branch where the account is kept.⁷² Where a customer has his account with the branch of a bank and dies, the local connection has been held decisive for the purposes of legal representation, collection and administration.⁷³ The customer has to demand repayment at this branch⁷⁴ and only in the case of non-payment has he the right to sue the bank at its head office, apparently for damages rather than debt.⁷⁵ In this environment, we need not be too surprised to see

⁶⁶ Reichsgericht, June 25, 1919, 96 RGZ. 161.

⁶⁷ Fuchs, *supra* note 1, at 119.

⁶⁸ New York Life Ins. Co. v. Public Trustee [1924] 2 Ch. 101.

⁶⁹ *Id.* at 121.

⁷⁰ *Id.* at 122.

⁷¹ DICEY, *CONFLICT OF LAWS* (5th ed. by Keith, 1932) 340.

⁷² CHESHIRE, *op. cit. supra* note 18, at 443 n. 394.

⁷³ Rex v. Lovitt [1912] A. C. 212, 219.

⁷⁴ Clare & Co. v. Dresdner Bank [1915] 2 K. B. 576; see Joachimson v. Swiss Bank Corp. [1921]

3 K. B. 110, 127.

⁷⁵ Conclusion by Hill, J., in Richardson v. Richardson [1927] P. D. 228, 232, 234, from various precedents, particularly Leader & Co. v. Direction der Disconto Gesellschaft (1914) 31 T. L. R. 83, 464.

Lord Atkins treat somewhat cavalierly the fear of the New York company that it may be sued again in some country where it has branches or assets. Yet that danger is present; nor is it obviated by the probability that the creditor, being indemnified by his own government⁷⁵ would not make efforts through other channels.

Nevertheless, the theory of the court would have great attraction if it were to be universally adopted. The German Supreme Court followed practically the same course, when confronted with actions instituted against the German or Austrian headquarters of liquidated branches.⁷⁶ The court admitted the right of allied powers to liquidate the assets of a German branch and that a debt of the branch was validly discharged by payment, in the course of liquidation, to an allied or neutral creditor, and in the case of German creditors by liquidation of their claims.

Whereas the Reichsgericht declared it immaterial where the debt is payable, the English court relies on elements of the debt, such as payability in London in sterling, quite as in the leading case of garnishment.⁷⁷ However, in both cases it would seem that emphasis was laid on the local contact with the branch rather than on considerations of conflict of law. Assuredly, were the conflicts rules on contracts not in the present state of chaos, the governing law and that of the situs might be expected to follow identical criteria.

The two courts have established a common ground on which an international conception may develop. A further contribution is to be found in two New York cases dealing with the liability of a New York insurance company for policies issued by its Russian branch in Czarist times.⁷⁸ The Soviet decrees nationalizing the branch abolished the claims of insurance holders in Russia; they did not seek to cancel these debts outright.⁷⁹ But this circumstance can hardly determine the effect of the decrees in New York.⁸⁰ Despite largely identical facts the two decisions of the highest New York court took the conflicting positions, respectively, that the obligation of the insurance company had its source in the laws of New York; and that the obligation rested on Russian law and had been destroyed by Soviet law. Judge Lehman, though concurring in the result upon another ground, dissented at this point in the second decision; he conceded that though situs was in Russia for some purposes, it was not for others, and he stressed a printed clause in the contract pledging all assets of the company to its fulfillment.

⁷⁵ Cf. Note (1925) 25 COL. L. REV. 366 at 367.

⁷⁶ Reichsgericht, June 2, 1923, 107 RGZ. 44 (concerning the London branch of the Dresdner Bank, a leading case, although dealing with negotiable instruments); dec. of May 2, 1924, 108 *id.* 265 (branch of a partnership in Madras); dec. of June 25, 1924, (1925) JUR. WOCH. 248 (London branch of an Austrian Corporation); dec. of April 3, 1925, 110 RGZ. 380 (London branch of the Laenderbank in Vienna); dec. of July 11, 1925, (1926) JUR. WOCH. 1986 (deposit of an employee with the branch of a German corporation in Rabaul, New Guinea); dec. of March 18, 1931, 132 RGZ. 128 (London branch of the Swiss Bank Corporation, much discussed).

⁷⁷ See *Swiss Bank Corp. v. Boehmische Industrial Bank* [1923] 1 K. B. 673, 682.

⁷⁸ *Slisberg v. New York Life Ins. Co.*, 244 N. Y. 482, 155 N. E. 749 (1921); *Dougherty v. Equitable Life Assur. Soc.*, 266 N. Y. 71, 193 N. E. 897 (1934).

⁷⁹ See Lehman, J., in the *Dougherty* case, preceding footnote, 266 N. Y. at 100-109, 193 N. E. at 908-911.

⁸⁰ Nussbaum, *Public Policy and the Political Crisis in the Conflict of Laws* (1940) 49 YALE L. J. 1027, 1039.

The problem should be reduced to the inquiry whether, or to what extent, the company was freed from liability for the debts of the branch, by the fact of expropriation. As is well known, a branch, although an integral part of the enterprise, nevertheless, has a certain life of its own within the state of its establishment.⁸¹ Any branch is customarily subject to a great number of administrative provisions of the state in which it operates. Branches of foreign corporations carrying on business in insurance, banking, transportation and other public utilities are controlled to a very high degree. In a case that has become famous, Judge Lehman himself attributed to the New York branch of a Russian insurance company a distinct personality because of the intensive control exercised by the state.⁸² The converse case of insurance policies issued by Russian branches of New York companies is comparable, the Czarist Russian government having required the insurance to be submitted to Russian law. Analogous submissions have been taken as grounds by the Swiss Federal Tribunal for holding an insurance contract inaccessible to French war measures,⁸³ and again by the German Supreme Court for assuming that an insurance policy issued by an Indian branch of the New York Life Insurance Company, later transferred to the Berlin branch of the company, could not be validly seized by the British custodian in India.⁸⁴ The contact of any branch, particularly in the field of banking or insurance operations, with the state in which they occur, is so comprehensive that very often the domesticating nature of the license for doing business has been exaggerated. This relation, however, is such as to make it seem natural that a local government taking over or destroying the branch by an exceptional act of sovereignty should include the debts with the assets. Obviously, this was what the Court of Appeals thought.

In accordance with this view, the British Public Trustee of the last war paid allied and neutral creditors⁸⁵ out of the seized assets. The French Court of Cassation, disapproving of a partly contrary practice, based its analogous opinion not only on the liability of a debtor's assets for his debts, but, as the case concerned Alsace, on Section 419 of the German Civil Code declaring the transferee of the assets of another person liable by force of law to pay the debts of the transferor.⁸⁶

The creditor, of course, has a claim in case the means of the branch are insufficient and insofar as the enterprise has been enriched by the contract or tort, on which his original cause of action rested.⁸⁷ Ancient parallels of the Roman *actio de peculio deve in rem verso* come to the mind.

⁸¹ Carl Wieland (1924) 43 (N. S.) ZEITSCHRIFT FÜR SCHWEIZERISCHES RECHT 271. Conclusions similar to those above have been suggested, as early as 1920, by Ernst Wolff, (1920) JUR. WOCH. 608; (1921) *id.* 245.

⁸² *Moscow Fire Ins. Co. v. Bank of New York & Trust Co.*, 280 N. Y. 286, 20 N. E. (2d) 758 (1939), *aff'd* 309 U. S. 624 (1940).

⁸³ Swiss Fed. Trib., Nov. 4, 1920; 46 BGE. II 421.

⁸⁴ Reichsgericht Nov. 11, 1920, (1921) JUR. WOCH. 245.

⁸⁵ Fuchs, *supra* note 1, at 209 n. 18.

⁸⁶ *Deutschmann v. Schisselé*, Cass.-civ., Feb. 5, 1924, (1924) REV. JURID. D'ALSACE ET DE LORR. 277, with instructive note by Wilhelm.

⁸⁷ This need has been recognized, with some doubts, by Gilligan, *supra* note 14, at 986.

In the last war complications arose from irresponsible waste by trustee administration in probably all belligerent countries. But this lies beyond our subject.

III. SITUS OF CORPORATE STOCK

The Versailles Treaty extended the right of liquidation to all participations in business associations deemed to be in Allied or associated countries. This was not expressly stated in the basic provision of Article 297b, but is nevertheless covered by the text. To implement the provision, Section 10, Paragraph 1, in the annex to Article 298, obligated Germany to deliver within six months to each of the Allied and Associated Powers "all securities, certificates, deed or other documents of title, including any shares, stock, debentures, debenture stocks or other obligations of any company incorporated in accordance with the laws of that Power." The Note of the Allied powers of May 22, 1919, asserted that Section 10 included merely a technical method for liquidating German interests in Allied territories. On these facts the question was highly controversial: in what territory were the shares and certificates situated? Section 10 seemed to suggest this was in the state in which a corporation was organized. German and Swiss writers agreed that German-owned shares in a Swiss corporation, therefore, were exempt from liquidation, irrespective of the location of the certificates, but disagreed on the analogous treatment of participations in German incorporated companies.⁸⁸

American decisions culminating in the opinions of two great jurists in the *Disconto-Gesellschaft* case⁸⁹ have focussed attention on an important phase of the matter that was neglected elsewhere, namely, the difference in legal character between the various kinds of certificates. At common law, shares cannot be transferred except by registration on the company's books. Certificates of stock have merely evidentiary value. This conception has continued to underlie many present statutes which at the same time allow the issue of certificates, indorsed in blank and transferable by delivery and yet not conferring the membership itself without subsequent registration. Such was the character, for instance, ascribed in an American⁹⁰ and a Canadian⁹¹ case to certificates of the Canadian Pacific Railway. Accordingly, seizure by the American Alien Property Custodian and the Canadian Trustee respectively, were effective at the place of the corporation, irrespective of transfers of the certificates abroad. Also bearer shares and bearer debentures of a gold mine in Transvaal were held to be situated and subject to seizure as enemy property within the Union, irrespective of the place in which the certificates were to be found.⁹²

Under English law and the Uniform Stock Transfer Act, however, registered

⁸⁸ For the German viewpoint, see ISAY, *supra* note 1, at 95 and FUCHS, *supra* note 1, at 126; for the Swiss, SAUSER-HALL, *supra* note 1, at 69, 70.

⁸⁹ *Disconto-Gesellschaft v. U. S. Steel Corp.*, 267 U. S. 22 (1925), opinion by Mr. Justice Holmes, *aff'd* 300 Fed. 741, opinion by Judge Learned Hand.

⁹⁰ *United Cigarette Mach. Co. v. Canadian Pacific Ry. Co.*, 12 F. (2d) 634 (C. C. A. 2d, 1926).

⁹¹ *Spitz v. Sec. of State of Canada* [1939] 2 Dom. L. R. 546 (Exch. Ct. Can.).

⁹² *Randfontain Gold Mining Co. v. Custodian of Enemy Prop.* [1923] A. D. 576 (App. Div. So. Afr.).

certificates, indorsed in blank or in similar form, incorporate the rights of the owner to demand registration as the owner of membership upon the books of the corporation. "Title to a certificate and to the share represented thereby can be transferred only by delivery of the instrument."⁹³ Accordingly, in the *Disconto-Gesellschaft* case seizure of the shares deposited in London by the English public trustee forfeited them, in the opinion of the Supreme Court of the United States.⁹⁴ The same view must be true for shares of the European companies conferring membership on the bearer.

At the beginning of the last war, thousands of American certificates, belonging to German or other nationals, were in deposit of London banks for the account of German banks. The certificates were seized by the American custodian. It has been said that in recognition of the situs at the place of incorporation, the English trustee by a post-war agreement, delivered the certificates to the American custodian.⁹⁵ This may have referred to those certificates in which the shares were not fully merged. In one American case, the English trustee seems to have yielded to the petition of the American office for possession of participations in a voting trust, which indeed were transferable only on the books of the corporation.⁹⁶

Thus there was no square decision concerning certificates issued under the New York or New Jersey law, according to the Uniform Act, deposited in a London bank claimed by both American and the English offices.

In what position were neutral companies? The courts have touched but cautiously on this problem. Mr. Justice Holmes asserted the theoretical right of the total governmental powers, federal and state, to "recognize nothing concerning the corporation or any interest in it that happened outside. But it prefers to consider itself civilized and to act accordingly."⁹⁷ Hence the indorsement in blank could work in favor of the English Public Trustee. But if the United States had taken a conflicting step, its "paramount power" over the corporation would prevail.

The question, therefore, arises whether, or in what circumstances, a state or nation that has allowed its own corporations to issue bearer certificates going out into the financial markets of the world will find itself justified in restricting the normal effect of their circulation. Police power in its enhanced shape as war power has its own needs and prerogatives. Nevertheless, it is a great merit of the courts of this country to have connected the problem with the normal considerations of commercial convenience and legal construction.

⁹³ Uniform Stock Transfer Act, §1, 6 U. L. A. (1922). On the problem, see Note (1932) 32 COL. L. REV. 89.

⁹⁴ *Disconto-Gesellschaft v. U. S. Steel Corp.*, *supra* note 89; cf. Pomerance, *The Situs of Stock* (1932) 17 CORN. L. Q. 43, 57; Note (1927) 15 CALIF. L. REV. 145, 153.

⁹⁵ (1927) 6 RECHTSVERFOLGUNG IM INTERNATIONALEN VERKEHR, Part I, 67.

⁹⁶ *Miller v. Kaliwerke Aschersleben Aktien-Gesellschaft*, 283 Fed. 746 (C. C. A. 2d, 1922).

⁹⁷ See *Disconto-Gesellschaft v. U. S. Steel Corp.*, 267 U. S. 22, 28 (1925).